

QWEST CORPORATION'S COMMENTS ON THE FACILITATOR'S QPAP FINAL REPORT

Qwest Corporation ("Qwest") submits these comments on the issues related to the Facilitator's Report on Qwest's Performance Assurance Plan ("QPAP"), dated October 22, 2001 and filed in the multistate proceeding jointly undertaken by the state commissions and/or utilities boards of Idaho, Iowa, Montana, New Mexico, North Dakota, Utah, Wyoming, Nebraska and Washington.

INTRODUCTION

The Facilitator's Report represents the culmination of a more than year long multistate review of the QPAP. Eleven states participated in the ROC organized Post Entry Performance Plan ("PEPP") workshops conducted for the purpose of analyzing and negotiating changes to the QPAP. And nine of those states participated in an unprecedented multistate hearing to address disputed issues. The issues were presented through comments and live testimony subject to cross-examination. These multiple processes have provided all participants a complete opportunity to be heard on the issues.

Before the PEPP collaborative, Qwest proposed a QPAP that mirrored the key structural areas of the FCC approved Texas performance assurance plan. Qwest then engaged in months of workshops in the PEPP collaborative during which, at the request of the CLECs, Qwest made substantial changes to the Texas plan. For example, as a result of that collaborative, Qwest modified key aspects of the statistical methodology applied to parity measures; increased payment opportunities by adding to the payment escalation method a corresponding stepped de-escalation process; eliminated caps on all

but billing performance measurements; and raised Tier 1 performance measurements classified as “medium” to “high”, thereby increasing potential payments.¹

Qwest further offered to make *additional* significant changes in the course of the multistate proceeding. For instance Qwest offered to add a method of allocating higher payments to high value services, to broaden the audit requirements to include risk based audits, and to include five additional performance measurements in the QPAP.²

The Facilitator’s Report recommends substantial *additional* changes to the QPAP filed in the multistate proceeding on June 29, 2001. While Qwest does not agree with all the recommendations or believe that they are necessary in order for the QPAP to be acceptable under the FCC guidelines, in consideration for having a plan that is acceptable to the states, Qwest has incorporated the recommendations into the QPAP. A redlined version of its June 29, 2001 proposed QPAP that reflects those changes is attached. In these comments, Qwest identifies its acceptance of the recommendations and, where necessary, limited clarifications or modifications to certain of the Facilitator’s recommendations.

COMMENTS ON FACILITATOR RECOMMENDATIONS

Provisions for Changing the Cap

The Recommendation of the Facilitator deviates from the hard 36% annual cap that has been approved in prior section 271 proceedings. However, Qwest believes that this limited approach is reasonable and has incorporated the recommended language into the attached draft at section 12.2.

¹ QPAP Report at 1.

² Report at 53-54, 77-78 and 46.

Foreclosing Recovery for CLEC Harm Occurring Late In the Year

While the implementation imposes some added administrative burdens, Qwest views the Facilitator's CLEC payment equalization recommendation as an innovative method of administering the QPAP such that in the event payments exceed the cap in any given year, all CLECs will receive an equal proportionate share of the payments. Qwest has incorporated the Facilitator's language into the QPAP with only minimal language changes viewed as necessary in order clarify how the complex process works.

The Facilitator recommends the use of an equalization technique that ensures all CLECs will receive an equal proportion of the payments that are due them in years where the annual cap is exceeded. As previously stated, Qwest does not oppose the Facilitator's recommendation, but clarifies language in the QPAP to implement this "equalization" mechanism. Because QPAP monthly payments may intermittently fall below or exceed the monthly cap, the calculation of the balancing account should be performed using year to date payments and a cumulative monthly cap.³ Additionally, Qwest proposes to apply equalization in the month when the year to date payment exceeds the monthly cumulative cap. With these changes, percentage equalization, as envisioned by the Facilitator, is achieved. The following red-lined modification of the Facilitator's recommendation included in the QPAP at Section 12.3 shows the necessary changes to implement the percentage equalization procedure in the QPAP:

³ It is reasonable to assume that the Facilitator intended such a calculation.

When the annual cap is reached, each CLEC shall, as of the end of the year, be entitled to receive the same percentage of its total calculated Tier 1 payments. In order to preserve the operation of the annual cap, the percentage equalization shall take place as follows:

1. The amount by which any month's year to date total payments exceeded the cumulative monthly cap (defined as 1/12th of the annual cap times the cumulative number of months to date) shall be calculated and apportioned between Tier 1 and Tier 2 according to the percentage that each bore of total payments for the year to date. The result of this calculation shall be known as the "Tracking Account."
2. The Tier 1 excess shall be debited against the monthly ~~next ensuing~~ payment due to each CLEC, by applying to the year-to-date payments received by each the percentage necessary to generate the required total Tier 1 amount.
3. The Tracking Amount shall be apportioned among all CLECs so as to provide each with payments equal in percentage of its total year to date Tier 1 payment calculations.

This calculation shall take place in the first month that year to date total payments are expected to exceed the cumulative monthly ~~annual~~ cap and for each month of that year thereafter. Qwest shall recover any debited amounts by reducing payments due to ~~from~~ any CLEC for that and any succeeding months, as necessary.

Allowing CLEC Recovery of Non-Contractual Damages in Other Proceedings

The Facilitator recommended modifications to section 13.6, regarding election of remedies, to clarify that CLECs that elect the QPAP surrender other contractual remedies, but retain noncontractual remedies (subject to an offset for any damages that represent compensatory recovery).⁴ Qwest does not oppose the Facilitator's approach and, in fact, has stricken the language found to be objectionable by the Facilitator. However, in implementing the Facilitator's Recommended approach, Qwest clarifies in the QPAP that payments under Commission rules or orders would be considered contractual in nature

⁴ Report at 31-33 (election of remedies), 35-36 (offset).

and therefore precluded. As the Facilitator recognized,⁵ this is explicit in the Colorado Special Master’s Report, which bars alternative remedies based on any “state law regulatory enforcement actions” that “result in payment of money to a CLEC.”⁶

Rules and orders for wholesale service quality issues are ultimately contractual in nature, because they relate to service purchased under an interconnection agreement and provide the same type of compensatory recovery as the QPAP. In contrast, the noncontractual causes of action referred to in the Facilitator’s Report (such as antitrust and tort) are distinct from performance obligations set forth in the interconnection agreement. This is reflected in the Facilitator’s express rejection of CLEC efforts to sue for remedies under state service quality rules, such as those providing remedies for collocation performance issues:⁷

[w]e are similarly not persuaded of the reasonableness of the ELI/Time Warner/XO Utah recommendation that CLECs retain the right to choose to take other remedies even after electing to take advantage of QPAP payments. ... It would not be reasonable to allow them to select those portions of it that are on balance more favorable than other remedies, while choosing to take other remedies in cases where they are more favorable. Qwest has no right to do so; a proper sense of balance with respect to liquidated damages should require the same of CLECs.⁸

⁵ Report at 31.

⁶ Colorado Special Master’s Report at 19.

⁷ See ELI/TW/XO Br. at 23 (“For example, the CLEC should not be required to give up all QPAP payments to be able to take advantage of the Washington Commission’s remedies for Qwest’s failure to provide collocation on a timely basis, RCW 80.36.560, instead of seeking QPAP payments for the same nonperformance. A CLEC should be able to choose whether to obtain payments under the QPAP or credits under the Commission rule even if the CLEC has incorporated the QPAP into its interconnection agreement. This section should be modified accordingly.”).

⁸ Report at 33.

Accordingly, to incorporate these views expressly in the QPAP, Qwest has added language specifying that rules and orders are treated as contractual:

13.6 This PAP contains a comprehensive set of performance measurements, statistical methodologies, and payment mechanisms that are designed to function together, and only together, as an integrated whole. To elect the PAP, CLEC must adopt the PAP in its entirety, in its interconnection agreement with Qwest. By electing remedies under the PAP, CLEC waives any causes of action based on a contractual theory of liability, and any right of recovery under any other theory of liability (including but not limited to a regulatory rule or order) to the extent such recovery is related to harm compensable under a contractual theory of liability (even though it is sought through a noncontractual claim, theory, or cause of action.).

This language incorporates the three-factor test concerning alternative remedies set forth on page 32 of the Facilitator's Report and is appropriate.

Offsetting QPAP Payment Liabilities by Other Awards

In light of objections raised by the CLECs as to the legal operation of the QPAP, the Facilitator recommended that Qwest include provisions in the offset section of the QPAP to clarify how the offset should operate. Qwest has incorporated those changes in Section 13.7.

Excluding Qwest Payment Responsibilities in the Case of CLEC Bad Faith

The QPAP contains a section that provides for circumstances in which Qwest would be excused from making the self-executing payments under the QPAP. CLECs objected to most aspects of this provision, notwithstanding the fact that it is patterned after the Texas PAP. The Facilitator recommended that the QPAP provide that Qwest would not be excused under section 13 for "performance that Qwest could reasonably have been expected to deliver assuming that it had designed, implemented, staffed, provisioned, and otherwise provided for resources required to meet foreseeable volumes

and patterns of demands upon its resources by CLECs.”⁹ Qwest has added the recommended language in new section 13.3.2 of the attached QPAP.

Differing SGAT and QPAP Force Majeure Provisions

At the CLECs’ request, the Facilitator recommended using the Force Majeure definition in section 5.7 of the SGAT, rather than the definition language in the QPAP.¹⁰ Qwest has made the recommended language changes in section 13.0.

Timing of Force Majeure Event Notices

At the CLECs’ request, the Facilitator recommended that the QPAP include a provision for Qwest to provide notice of the force majeure events within 72 hours of the time that they occurred or that Qwest could have reasonably expected to learn of them.¹¹ Qwest has added that provision in section 13.3 of the QPAP.

Impact of Force Majeure Events on Interval Measures

The Facilitator recommended the inclusion of language proposed by AT&T that limits the period of time during which an event disrupts performance.¹² Qwest has added that language verbatim at the end of section 13.3 of the QPAP.

⁹ Report at 39 (exclusions).

¹⁰ Report at 39 (force majeure).

¹¹ Report at 39-40.

¹² Report at 40.

Applying Force Majeure Events to Parity Measures

As the Facilitator indicated, AT&T opposed applying force majeure exceptions to parity measurements.¹³ The Facilitator accepted their position, and Qwest has incorporated the recommended changes into the QPAP in section 13.3.

CLEC Failures to Forecast as a Qwest Performance Excuse

WorldCom and Covad requested that any forecast requirements in the QPAP be limited to those forecasts required by the SGAT. The Facilitator accepted that position and recommended a corresponding change in the language.¹⁴ Qwest has modified the QPAP Section 13.3 in accordance with the Facilitator's recommendation.

Tier 2 Payment Use

The Facilitator recommended language that broadens both the sources for depositing Tier 2 funds and the use of Tier 2 funds.¹⁵ Qwest does not object to the suggested language and has incorporated it into section 7.5 of the QPAP. Qwest clarifies in these comments that it will pay Tier 2 funds upon implementation as follows: Unless the commission directs Qwest to deposit the funds into another “source provided for under state law,” Qwest will first make Tier 2 payments to a fund established by the state commission pursuant to section 7.5, provided that such a fund exists and the Commission identifies the fund to Qwest by the time Tier 2 payments are due under the QPAP. If no such fund exists, Qwest will deposit the Tier 2 funds into the state general fund.

¹³ Report at 40.

¹⁴ Report at 41.

¹⁵ Report at 42.

Funding Commission Qwest/CLEC Oversight Activities

In its Report, the Facilitator recommends “the creation of a funding mechanism to support state commission activities.”¹⁶ Qwest has incorporated the “Special Fund” into the QPAP as outlined by the Facilitator in section IV.D.1 of the QPAP Report. Its incorporation into section 11.3 of the QPAP required the following additional details.

The specific nature of the Special Fund was not clearly defined in the Facilitator’s report. Qwest envisions that an interest bearing account would best serve the purpose. Qwest is prepared to establish an escrow account at one of the major financial institutions with which Qwest regularly does such business. The Special Fund will be established at the time the FCC gives 271 approval to Qwest for the first of the participating states and funding from that state will start immediately. Participation in the Special Fund will continue as Qwest receives 271 approval for the remaining participating states. At least initially, the participating states are those which provide a positive recommendation based on the attached QPAP.

Qwest will deposit funds into the Special Fund by wire transfers of the appropriate portions of Tier 1 and Tier 2 funds described in the QPAP Report. Because of the requirements that Tier 2 funds be spent first, that residual Tier 1 funds be disbursed at least every two years to the CLECs, and the specific audit expense provisions described in section 15.4 of the QPAP, Tier 1 and Tier 2 funds should be segregated for record keeping purposes. Qwest also requires a change in the Facilitator’s recommendation to indicate that it will advance a reasonable but predetermined amount of money (\$200,000). This should be sufficient to allow planning and commencement of

the funded activities. Without knowing the breadth of the functions for which payment must be advanced, a provision requiring Qwest to advance unlimited funds would place an unreasonable financial burden on Qwest.

Disbursement from the Special Fund will require authorization from the participating Commissions. The nature of an escrow account is that disbursements by the financial institution are pursuant to instructions from pre-designated individuals. Therefore, it will be necessary for the participating Commissions to pre-designate individuals who shall be authorized to direct such disbursements.

In order to trigger payment, it is envisioned that expense claims would be presented to the designated individuals who may authorize such payments from the Special Fund. Disbursements will require coding so that the financial institution debits the appropriate Tier 1 or Tier 2 ledger balance so as to ensure proper record keeping.

Qwest believes that the Special Fund can function smoothly, however, it will require Commission participation in the review and authorization of disbursements to cover the legitimate expenses outlined by the Facilitator.¹⁷ Finally, Qwest maintains that for clarity of purpose and administration, and to adequately fund the QPAP activities envisioned by the Facilitator, the Fund should be used only for the QPAP administration purposes identified in 11.3:

Qwest has included the following provisions in section 11 of the QPAP.

11.3 A Special Fund shall be created for the purpose of (a) payment of an independent auditor and audit costs as specified in section 15.0, (b) payment of an independent arbitrator to resolve disputes arising out of the six-month review as described in section

¹⁶ Report at 42.

¹⁷ Report at 42.

16.0, and (c) payment of other expenses incurred by the participating Commissions in the regional administration of the PAP.

11.3.1 Qwest shall establish the Special Fund as an interest bearing escrow account upon the first FCC section 271 approval of the PAP applicable to a participating state Commission. Qwest shall be authorized to withhold and deposit into the Special Fund one-fifth of all Tier 1 payment to CLECs that exceed the month 1 payment amounts in Table 2 and one-third of all Tier 2 payments. The cost of the escrow account will be paid for from account funds.

11.3.2 Commissions participating in the Special Fund shall appoint a person designated to administer and authorize disbursement of funds. All claims against the fund shall be presented to the Commissions' designates and shall be the responsibility of the participating Commissions. Disbursements from the Special Fund shall first be from Tier 2 funds and second from Tier 1 funds. Not less than every two years, Tier 1 funds that are not needed to meet the continuing obligations of the Special Fund shall be returned on a pro-rata basis to CLECs.

11.3.3 Qwest shall advance funds, not to exceed \$200,000, to meet initial claims against the Special Fund to the extent Tier 1 and Tier 2 contributions are insufficient. Qwest shall be allowed to recover any such advances plus interest at the rate that the escrow account would have earned.

Three Month Trigger

The Facilitator recommended significant changes to the trigger of Tier 2 payments.¹⁸ Even though the three-month trigger was a part of the FCC approved Texas plan, Qwest has agreed to incorporate the Facilitator's changes into the QPAP at section 9.1.2.

Changing the Weights of Some QPAP Measures

Through its testimony, Qwest made a proposal to accommodate AT&T's demand for higher payment treatment for certain services. Qwest's proposal included a balancing approach (higher valued services increased and lower valued services decreased) as opposed to a straight ratcheting approach proposed by AT&T (everything went up). The Facilitator rejected the AT&T approach and recommended that since the Qwest proposal was not accepted it need not be included in the QPAP.¹⁹ Because the June 29, 2001

¹⁸ Report at 42-43

¹⁹ Report at 53-55 (Measure Weighting).

QPAP had not been changed to include the Qwest proposal, no changes are reflected in the attached document.

Collocation

Qwest responded to CLEC requests for higher payments for collocation by agreeing to add a “days late” collocation payment schedule proposed by the CLECs in the ROC PEPP collaborative. The Facilitator recommended inclusion of the proposal and it has been added in section 6.3.²⁰

Rounding Problems with Small Order Volumes

Qwest has implemented the spirit of the Facilitator’s decision in Section 2.4, but has made a minor adjustment to the recommended calculation to determine missed performance measures for benchmark standards where low CLEC volumes are such that a 100% performance result would be required to meet the standard. The Facilitator recommended that Qwest use 12 months of performance results to determine if the miss in the current month should be counted. Qwest seeks to clarify the language such that it will use the current month’s results, plus a sufficient number of previous consecutive months’ performance data so that a 100% performance result would not be required to meet the standard. With this modification, the Facilitator’s goal of not requiring 100% performance to satisfy a benchmark requirement is achieved. Qwest made the recommended changes in section 2.4.

Limits on QPAP Amendments

The Facilitator agreed that Qwest should not be subjected to unknown changes to the QPAP.²¹ He recommends only that Qwest adopt a provision similar to the Texas plan requiring Qwest to arbitrate disputes over the addition of new measurements arising out of the six-month review. The Facilitator recommended that any disputes should be

²⁰ Report at 56.

²¹ Report at 59-62.

resolved through arbitration as provided for in the SGAT. Qwest has added language in section 16.1 that implements that modification.

The Facilitator also suggested that the six month review be conducted on a collaborative basis. Qwest has also incorporated language to implement that recommendation into its QPAP at section 16.1.

Finally, Qwest has incorporated the Facilitator's recommendation for a two-year review into section 16.2 of the QPAP.

Minimum Payments

The Facilitator found that Qwest demonstrated that CLECs were not undercompensated under the QPAP.²² However, out of concern over potential (and clearly unproven) disproportionate harm to small CLECs, the Facilitator recommended making an annual minimum payment based upon the number of months in which Qwest fails to meet performance standards. Qwest vigorously disagrees with the need for any additional payment opportunities for small CLECs, however, has agreed to incorporate the changes into the QPAP at section 6.4.

Dispute Resolution

Qwest has added the recommended language in a new section 18.0.

Assuring Continuing Data Accuracy

Qwest believes it has incorporated the details and the spirit of the audit provisions outlined by the Facilitator in the QPAP Report.²³ There are, however, specific areas of concern on Qwest's part, which result in the insertion of several key concepts not included by the Facilitator. Qwest believes, however, that its insertions are in keeping with the principles recognized by the Facilitator.

²² Report at 67-68.

²³ Report at 77-82 (Assurances of the Reported Data's Accuracy).

Qwest added a section which requires the independent auditor to coordinate with other audits so as to avoid duplication and not impede Qwest's ability to meet the requirements of other provisions of the QPAP.

The Facilitator recognized the potential calamity of individual state audits.²⁴ Fortunately, the 9 participating Commissions will not contribute to such calamity. But, there is the potential for 5 other state audits (Colorado, Arizona, Minnesota, Oregon, and South Dakota). Qwest is hopeful that several of these states will participate in a common audit. Even under the best scenario, however, Qwest believes that one or two, and possibly three states will decide to conduct separate audits. It would serve the interests of all parties, as The Facilitator himself recognized, that coordination of audits be required.²⁵

Of greatest concern to Qwest is that an audit impedes Qwest's ability to operate under the time lines and due dates for collecting and processing data, publishing performance results, and calculating QPAP payments. It is imperative that the audit plan and its operation not be such as to impede Qwest's day-to-day performance under the QPAP regime.

The conduct of and the results from the independent audit certainly have the potential be subject to disputes. It would appear reasonable that the audit provisions would provide for a process for contesting aspects of the audits.

With respect to decisions of the independent auditor as to whether to conduct or not conduct a CLEC proposed audit, the Facilitator did not propose a materiality decision criteria. Qwest added such a materiality criteria as it relates to data discrepancies. It would be reasonable that small data discrepancies, alone, should be the basis for an audit.

²⁴ Report at 79-80.

²⁵ Report at 79-82.

While it was not specified, Qwest added a provision that a CLEC proposed audit would not proceed while dispute resolution was pending. Such a provision would appear to be logical.

Also added was a provision that a CLEC may not propose an audit of data more than 3 years old. Such a provision is in keeping with the provision in section 14.4 of the QPAP that Qwest not be required to keep data beyond 3 years.

PUC Access to CLEC Data

In response to CLEC objections to Qwest providing the Commissions with CLEC specific performance data, the Facilitator recommended adding a provision specifying certain action to protect that data.²⁶ Qwest has incorporated that provision into section 14.2 of the QPAP.

Retention Period for CLEC Data

At the suggestion of WorldCom, the Facilitator recommended that the QPAP contain a requirement that documents be retained for a specified period.²⁷ That recommendation has been incorporated into section 14.4 of the QPAP.

Late Reports

The Facilitator recommended additional late reporting payments, escalating the longer the reports are late.²⁸ Qwest has included those additional payment obligations into the QPAP at section 14.3.

²⁶ Report, pp. 82-83

²⁷ Report, pp. 83-84

²⁸ Report, pp. 83-84.

Payment of Interest

In the course of the proceeding, Qwest made a commitment to include interest payments in the QPAP. The Facilitator recommended using the prime rate rather than the one-year treasury rate as the interest amount.²⁹ Qwest has included that change into its QPAP at section 11.1.

Billing Credit Format

Qwest has included a provision reflecting the recommendation that Qwest commit to providing payment summary information in a form substantially similar to that distributed to parties in this proceeding. Qwest has made such a commitment in section 11.2.

Uncontested Qwest Changes to the QPAP

These changes were made and are reflected by the deletions in section 7.2 and Attachment, footnote c and Attachment 3.

State Commission Powers

The Facilitator recommended deleting section 12.3, which Qwest incorporated from the Texas plan.³⁰ Qwest has made that deletion.

Performance Reports Pending Section 271 Approval

Qwest does not oppose providing reports for informational purposes. However, it is unnecessarily complicated to say that Qwest should report as if the QPAP were effective as of October 1, 2001. Obviously, no CLECs have opted into the QPAP. Accordingly, in order provide information to the Commissions and CLECs prior to the

²⁹ Report at 73.

³⁰ Report at 88.

effective date of the QPAP, Qwest will provide Tier 2 reports and aggregate Tier 1 reports to the states and the parties participating in this QPAP proceeding, beginning with the November payment reports and continuing through the date Qwest obtains approval for the state.

SGAT Limitation of Liability to Total Amounts Charged to CLECs

Qwest has made the recommended changes to the QPAP. Qwest will file a revised SGAT to incorporate the changes into section 5.8.1.

Incorporating the QPAP into SGAT and Interconnection Agreements

The QPAP will become Attachment K to the SGAT. If a CLEC wishes to opt into the QPAP, it must do so through an Amendment to its interconnection agreement which must include at a minimum, both Attachment K and Attachment B in lieu of other contractual standards and remedies. Any additional elections will depend upon the specific interconnection agreement at hand.

CONCLUSION

As the product of CLEC negotiated, and now state staff recommended changes, the QPAP is more than sufficient to meet the FCC's expectations and assure that FCC approval of Qwest's application for 271 relief is in the public interest.

Qwest's commitment to the QPAP coincident with receiving 271 approval, strongly supports a positive recommendation from this Commission that Qwest's section 271 application is in the public interest.